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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 TRIDENT SEAFOODS
11 CORPORATION,

12 Plaintiff,

13 v.

14 ACE AMERICAN INSURANCE
15 COMPANY,

Defendant.

CASE NO. C12-2265JLR

ORDER GRANTING MOTION
FOR PARTIAL SUMMARY
JUDGMENT

16 **I. INTRODUCTION**

17 Before the court is Defendant ACE American Insurance Company's ("ACE")
18 motion for partial summary judgment on Plaintiff Trident Seafoods Corporation's
19 ("Trident") breach of contract claim. (*See* Mot. (Dkt. # 24).) The court has reviewed the
20 motion, all submissions filed in support of or in opposition thereto, the balance of the
21 record, and the applicable law. Having heard oral argument and being fully advised, the
22 court GRANTS ACE's motion for partial summary judgment.

II. BACKGROUND

Trident engages in wide-ranging activities in the seafood business and produces nearly 500 different seafood products. (Misenti Decl. (Dkt. # 30) ¶ 3.) It has 6,000 employees during its peak season, 16 processing plants throughout Alaska, the Pacific Northwest, and Minnesota (5/9/2013 Fonda Decl. Ex. D (Dkt. # 25-4) at 4), and has on-shore warehouses and offices (Resp. (Dkt. # 29) at 6). It maintains a diverse insurance portfolio meant to ensure that it is protected in all of its activities and there are no gaps in coverage. (Misenti Decl. ¶ 3.) Trident's Commercial General Liability ("CGL") policy with ACE, from which this matter arises, includes coverage for "products/completed operations" liability. (5/9/2013 Fonda Decl. Ex. G (Dkt. # 25-7) at 56, 80.) The CGL policy excludes coverage for liability "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured." (*Id.* at 66.) The products liability provision also contains an exception that states that the coverage does not include damage arising out of "the transportation of property, unless the injury or damage arises out of a condition in or on a vehicle created by the 'loading or unloading' of it." (*Id.* at 81.)

Trident alleges that ACE breached the parties' insurance contract when it refused to indemnify Trident for damage caused by one of Trident's products. (12/28/2012 Fonda Decl. Ex. A (Dkt. # 3) ¶¶ 22-26.) Trident faced products liability for fish oil contaminated with petroleum, which it sold to a Japanese company, Matsuura. (Misenti Decl. ¶ 5.) Petroleum had contaminated fish oil stored in a tank on Trident's ship, the *Kodiak Alaska*, through a crack in a fuel tank. (*Id.*) Petroleum contaminated fish oil in

1 other tanks aboard the *Kodiak Alaska* when fish oil from the contaminated tank flowed
2 through other storage tanks during the unloading process in Dutch Harbor, Alaska. (*Id.*)
3 Trident discovered and repaired the cracked fuel tank after it had delivered the
4 contaminated fish oil to Japan, but before Matsuura purchased the fish oil. (*Id.* ¶ 6.)
5 Trident’s onshore personnel failed to “connect the dots” and warn others about the
6 possibility of contaminated fish oil, and the fish oil was sold to Matsuura. (*Id.*) Trident
7 settled with Matsuura for over \$5 million, \$3 million of which was covered by Trident’s
8 other insurers. (*Id.* ¶ 8.) Trident’s products recall insurer contributed \$2 million and its
9 protection and indemnity insurer contributed \$1 million toward Trident’s settlement with
10 Matsuura. (*Id.* ¶ 7.)

11 Trident alleges that its products liability policy with ACE obligates ACE to pay
12 for some of the settlement with Matsuura. (12/28/2012 Fonda Decl. Ex. A ¶¶ 14-17.)
13 Trident brings claims against ACE for breach of contract (*id.* ¶¶ 22-26), breach of its duty
14 of good faith (*id.* ¶¶ 27-30), violation of Washington’s Consumer Protection Act, RCW
15 § 19.86, and Washington Administrative Code § 284-30-330 (*id.* ¶¶ 31-36), violation of
16 Washington’s Insurance Fair Conduct Act, RCW § 48.30 (*id.* ¶¶ 37-42), contribution for
17 amounts paid by Trident’s other insurers (*id.* ¶¶ 43-47), and declaratory judgment (*id.*
18 ¶¶ 48-49). ACE asserts that it has no duty to indemnify Trident and moves for partial
19 summary judgment on Trident’s breach of contract claim. (Mot. at 1-2.)

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III. ANALYSIS

A. Standard of Review

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of showing that there is no material factual dispute. *Id.* at 323-25. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Id.* at 324. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991). Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. ACE is Entitled to Summary Judgment

The court must determine if ACE will prevail as a matter of law. The interpretation of an insurance contract is a matter of law. *Am. Best Food, Inc. v. Alea London, Ltd.*, 229 P.3d 693, 695 (Wash. 2010). "An interpretation of an insurance clause must be reasonable and take into account the purpose of the insurance at issue." *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 871 P.2d 146, 152 (Wash. 1994). However, a court must enforce the unambiguous language of a policy as written, and may not modify it. *Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (2005). While

1 exclusions must be strictly construed against the insurer, “a strict application should not
2 trump the plain, clear language of an exclusion such that a strained or forced construction
3 results.” *Id.*

4 In this case, ACE convincingly demonstrates the watercraft exclusion in the
5 insurance policy precludes coverage of Trident’s claim as a matter of law. Under
6 Washington law, “the phrase ‘arising out of’ is unambiguous and has a broader meaning
7 than ‘caused by’ or ‘resulted from.’ It is ordinarily understood to mean ‘originating
8 from’, ‘having its origin in’, ‘growing out of’, or ‘flowing from’.” *Toll Bridge Auth. v.*
9 *Aetna Ins. Co.*, 773 P.2d 906, 908 (Wash. Ct. App. 1989) (citations omitted). *See also*
10 *Mut. of Enumclaw Ins. Co. v. Jerome*, 856 P.2d 1095, 1097 (Wash. 1993) (“In
11 Washington, an accident arises out of the use of a vehicle if the vehicle itself or
12 permanent attachments to the vehicle causally contributed in some way to produce the
13 injury.”) (internal quotation marks omitted). Furthermore, “‘arising out of’ and
14 ‘proximate cause’ describe two different concepts. *Toll Bridge*, 773 P.2d at 909-10. It is
15 not necessary to examine the proximate cause of an incident in order to determine
16 whether the incident is excluded from coverage by “arising out of” language. *Id.* at 910;
17 *see also Krempel v. Unigard Sec. Ins. Co.*, 850 P.2d 533, 535 (Wash. Ct. App. 1993)
18 (“[U]nder Washington law it is not necessary to analyze causation issues where the
19 policy language does not expressly require it.”).

20 In *Toll Bridge*, the Washington State Toll Bridge Authority (“TBA”), which
21 operated ferries and ferry terminals, had a terminal liability policy, which excluded
22 incidents “arising out of the operations, maintenance or use of any watercraft.” 773 P.2d

1 at 907-08. The TBA sought indemnity from its insurer for an incident in which a car
2 struck a pedestrian as both were exiting a ferry. *Id.* at 907. The court upheld summary
3 judgment in favor of the insurer because the accident “originated from” unloading the
4 ferry, and thus, as a matter of law, the exclusion applied. *Id.* at 908.

5 Like in *Toll Bridge*, summary judgment for the insurer ACE is appropriate in the
6 instant case. Just like the insurance policy in *Toll Bridge*, the insurance policy between
7 Trident and ACE excludes coverage “arising out of” the ownership, use, or maintenance
8 of any watercraft. (5/9/2013 Fonda Decl. Ex. G at 66.) Just like the incident in question
9 in *Toll Bridge*, here the incident for which Trident seeks coverage originated from the use
10 or maintenance of a watercraft. It is an uncontested fact that the contamination of the fish
11 oil originated from a cracked fuel tank aboard the *Kodiak Alaska*. (Misenti Decl. ¶ 5;
12 Mot. at 3; Resp. at 9.) This clearly indicates that the contamination originated from the
13 maintenance and use of the *Kodiak Alaska*. Thus, like in *Toll Bridge*, the watercraft
14 exclusion applies as a matter of law and summary judgment for ACE is appropriate.

15 Trident attempts to distinguish *Toll Bridge* from the case at hand. First, Trident
16 argues that *Toll Bridge* is factually inapposite because *Toll Bridge* involved a collision
17 accident rather than a products liability claim. (Resp. at 21.) This is a distinction without
18 a difference. There is no reason to think that *Toll Bridge*’s interpretation of “arising out
19 of” insurance exclusions is confined to collisions. *See Krempel*, 850 P.2d at 535 (citing
20 *Toll Bridge* in a non-collision context). Trident’s effort to distinguish *Toll Bridge* here
21 fails. In a related argument, Trident asserts that watercraft exclusions in general only
22 apply to “collisions and other similar types of accidents and occurrences, not product

1 liability claims.” (Resp. at 20.) This assertion, however, contravenes the plain language
 2 of the contract, which applies the watercraft exclusion to products/completed operation
 3 hazard coverage.¹

4 Second, Trident attempts to distinguish *Toll Bridge* by arguing that, unlike the
 5 policy in *Toll Bridge*, Trident’s products liability policy expressly covers the damage
 6 because the policy specifically includes damage arising out of the “loading or unloading”
 7 of vehicles, including watercraft.² (Resp. at 21, 23; *see* 5/9/2013 Fonda Decl. Ex. G at
 8 81.) This argument fails because the contamination originated from a cracked fuel tank
 9 aboard the *Kodiak Alaska* leaking into a tank of fish oil regardless of the subsequent
 10 spread of the contamination during the unloading process. (Misenti Decl. ¶ 5; Mot. at 3;
 11 Resp. at 9.) Washington precedent establishes that where an excepted risk sets into
 12 motion a chain of events that includes a covered risk, the *Toll Bridge* analysis still
 13 applies. *See Krempf*, 850 P.2d at 706-7 (applying *Toll Bridge* in upholding summary

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 15 ¹ Trident’s Products/Completed Operations Hazard coverage is part of its CGL coverage.
 16 (Fond Decl. Ex. G at 5.) The watercraft exclusion in the policy is listed under exclusions to
 17 Coverage A, which covers liability from bodily injury and property damage under the CGL
 coverage. (*Id.* at 64, 66.) Thus, the watercraft exclusion applies to Trident’s claims for coverage
 of its liability due to Matsuura’s property damage.

18 ² Trident also makes the similar argument that the inclusion of loading/unloading-based
 19 coverage in the policy trumps the watercraft exclusion. (Resp. at 21.) This argument fails for
 20 similar reasons. “Arising out of” means “originating from.” *Toll Bridge*, 773 P.2d at 908. The
 21 contamination originated from the cracked fuel tank even if it was later spread in the unloading
 22 process. Thus, the watercraft exclusion prevents coverage in this situation. *See also Krempf*,
 850 P.2d at 706-7 (applying *Toll Bridge* in upholding summary judgment for an insurer in a case
 where “the *excepted* risk, use or maintenance of an automobile, set into motion what *Krempf*
 contends is a *covered* risk, throwing the flaming tank of gasoline”) (emphasis in original). While
 exclusions from coverage must be strictly construed against an insurer, “a strict application
 should not trump the plain, clear language of an exclusion such that a strained or forced
 construction results.” *Quadrant Corp.*, 110 P.3d at 737.

1 judgment for an insurer in a case where “the *excepted* risk, use or maintenance of an
2 automobile, set into motion what Krempf contends is a *covered* risk, throwing the
3 flaming tank of gasoline”) (emphasis in original). Thus, Trident’s contention that this
4 distinguishes its case from *Toll Bridge* fails.

5 Third, Trident attempts to distinguish its case from *Toll Bridge* by noting that in
6 *Toll Bridge* the insured had multiple insurance policies and that the watercraft exclusion
7 functioned to avoid overlapping coverage. (Resp. at 21.) However, this appears to be
8 true for Trident as well. Trident’s products recall and protection and indemnity insurers
9 together paid \$3 million toward Trident’s settlement with Matsuura. (Misenti Decl. ¶ 7.)
10 Although Trident alleges that ACE is responsible for some or all of the amount paid by
11 Trident’s other insurers (12/28/2012 Fonda Decl. Ex. A ¶¶ 43-47), the presence of
12 multiple other insurance policies which at least colorably cover this incident defeats
13 Trident’s efforts to distinguish *Toll Bridge* on these grounds. It is also not clear that the
14 presence of other insurance policies matters to the court’s reasoning in *Toll Bridge*. The
15 court in *Toll Bridge* relies on the plain language of the insurance policy, not the policy’s
16 broader context. 773 P.2d at 910 (“The terms of an insurance policy must be construed in
17 light of the plain, ordinary and popular meaning of the words used.”). Thus, Trident’s
18 attempts to distinguish *Toll Bridge* from the instant case fail.

19 Trident also argues that applying the policy’s watercraft exclusion here would
20 make Trident’s products liability policy with ACE illusory. (Resp. at 18-19.) Trident,
21 however, has many shore-based facilities, including processing plants, warehouses, and
22 offices. (Resp. at 6.) It has 16 processing plants throughout Alaska, the Pacific

1 Northwest and Minnesota. (5/9/2013 Fonda Decl. Ex. D at 4.) ACE admits in its
2 briefing that a product liability claim where the loss originated from one of these shore-
3 side facilities would be covered. (Reply (Dkt. # 36) at 7.) *See also Toll Bridge*, 773 P.2d
4 at 910 (holding that the insurance policy with a watercraft exclusion is not illusory
5 because “there are numerous terminal facility operations creating potential liability
6 unrelated to any activity or actions of the vessel”).

7 **C. *American Best Food* is Not Applicable**

8 Trident further argues that shore-based negligence on the part of its employees
9 was an intervening cause of the damage to Matsuura, and that this intervening cause
10 trumps the damage’s origins aboard the *Kodiak Alaska*. (Resp. at 22.) To support this
11 contention, Trident cites *American Best Food, Inc. v. Alea London, Ltd.*, in which the
12 court upheld the reversal of summary judgment for an insurer in a case where an insured
13 nightclub allegedly negligently “dumped” an injured patron out on the sidewalk
14 following an assault. 229 P.3d 693, 695 (Wash. 2010). The court held that the insurer
15 had a duty to defend the nightclub as a matter of law. *Id.* at 701. It held that the
16 insurance policy covered the nightclub’s liability “to the extent [post-assault negligence]
17 caused or enhanced” the patrons injuries, despite the policy excluding liability “arising
18 out of” assault or battery. *Id.* at 697-99. However, the *American Best Food* Court never
19 determined to what extent the nightclub’s post-assault negligence made it liable for the
20 patron’s injuries, if at all. *American Best Food* deals with the duty to defend rather than
21 the duty to indemnify. *Id.* at 695. As the court makes clear multiple times, “the duty to
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defend is different from and broader than the duty to indemnify.”³ *Id.* at 696, 699, 700. *See also Trident Seafoods Corp. v. Commonwealth Ins. Co.*, C10-0214RAJ, 2010 WL 3894111, at *9 n.3 (W.D. Wash. Sept. 29, 2010) (rejecting *American Best Food*’s applicability because its “holdings relate to the insured’s duty to defend, which is not an issue in Defendant’s motion. . . . To whatever degree [*American Best Food*] also touches on the duty to indemnify . . . [it] does not represent a change in the law”). Furthermore, *American Best Food* is factually distinguishable from the instant case: in *American Best Food*, coverage depended on the nightclub’s negligence directly causing or enhancing the victim’s injuries. 229 P.3d at 699 (holding that the policy afforded coverage “to the extent [post-assault negligence] caused or enhanced [plaintiff]’s injuries”). Trident’s shore-based negligence consists of failing to “connect the dots” after discovering the cracked fuel tank when the contaminated fish oil had already been shipped to Japan. (Misenti Decl. ¶ 6.) This is less direct as a cause of Trident’s products liability than the nightclub’s post-assault negligence was in *American Best Food*, even though shore-based negligence may be a but-for cause of Trident’s liability.

D. Industry Custom and Other Insurance Policies Are Not Relevant Because of the ACE Policy’s Unambiguous Language

Trident argues the watercraft exclusion does not apply to their Products/Completed Operations Hazard coverage because applying a watercraft

³ The court elaborates that “the duty to indemnify exists only if the policy *actually covers* the insured’s liability. The duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint.” *Am. Best Food*, 229 P.3d at 696 (emphasis in original).

1 exclusion to a products liability claim “contravenes industry understanding, custom, and
 2 practice.”⁴ (Resp. at 14-15.) In support of this, Trident cites an Insurance Risk
 3 Management Institute statement that automobile exclusions only apply to damage arising
 4 “out of the automobile’s inherent nature” and actually produced by the automobile. (*Id.*
 5 at 14.) Trident further cites multiple declarations from insurance industry professionals
 6 that it is unusual for a watercraft exclusion to apply to a products liability policy. (Resp.
 7 at 19.) ACE disputes this description of industry custom and points to the existence of a
 8 products/completed operations hazard coverage policy that does not have a watercraft
 9 exclusion. ACE argues that the existence of such a policy indicates the Trident had a
 10 choice regarding coverage and chose to purchase a policy with a specific watercraft
 11 exclusion. (Reply at 2.) The court, however, need not reach industry custom to decide
 12 this case.⁵ The plain language of the policy indicates that the watercraft exclusion
 13 applies to the products completed operations coverage. *See supra* note 1. The “arising
 14 out of” watercraft exclusion is unambiguous as a matter of law. *Toll Bridge*, 773 P.2d at
 15 908. A court must enforce the unambiguous language of a policy as written, and may not
 16 modify it. *Quadrant*, 110 P.3d at 737.

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 18 ⁴ Trident also argues that watercraft exclusions only apply to “collisions and other similar
 19 types of accidents.” (Resp. at 20.) The court rejects this argument as well because it contravenes
 the plain language of the contract.

20 ⁵ The court consequently does not reach ACE’s request to strike the declarations
 21 submitted by Trident in support of its response, many of which have to do with industry custom.
 22 (See Reply at 10-12.) The court has not used the declarations in coming to its decision with the
 exception of the Misenti Declaration. The court has only used the Misenti Declaration to support
 specific facts of which Mr. Misenti has personal knowledge.

1 At oral argument, Trident referred to an insurance policy with Liberty Mutual,
2 which includes products completed operations hazard coverage, and which, counsel
3 represented, expanded its watercraft exclusion to explicitly cover instances of negligent
4 hiring, training and supervision. Trident argues that a comparison of the Liberty Mutual
5 policy and the ACE policy indicates that the ACE policy does not cover exclude
6 instances of negligent hiring, supervision, and training. Indeed, “in evaluating the
7 insurer’s claim as to meaning of language used, courts necessarily consider whether
8 alternative or more precise language, if used, would have put the matter beyond
9 reasonable question.” *Lynott*, 871 P.2d at 151. However, this argument misses the mark.
10 Even if, *arguendo*, the ACE policy covers negligent hiring, supervision, and training, it
11 explicitly excludes coverage for incidents arising out of the “use” or “maintenance” of a
12 watercraft. (5/9/2013 Fonda Decl. Ex. G at 66.) Trident’s liability, which was caused by
13 a cracked fuel tank aboard the *Kodiak Alaska* (Misenti Decl. ¶ 5), plainly arose out of the
14 “use” and “maintenance” of a watercraft. Even if the ACE policy does not exclude
15 watercraft-based negligent hiring, training, or supervision, it would still exclude the
16 incident in question in this matter. Negligent hiring, training, and supervision may be a
17 but-for cause of the fish oil contamination, but it is plain that, in this matter, the
18 contamination originated from the cracked fuel tank, and is thus excluded by ACE’s
19 watercraft exclusion.

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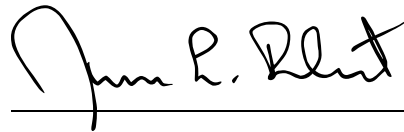
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IV. CONCLUSION

For the forgoing reasons, the court GRANTS ACE's motion for partial summary judgment (Dkt. # 24).

Dated this 2nd day of August, 2013.

A handwritten signature in black ink, appearing to read "James L. Robart", written over a horizontal line.

JAMES L. ROBART
United States District Judge